HARVARD

LAW REVIEW.

VOL. VII. JANUARY 25, 1894. NO. 6.

RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY.

Not infrequently do the records of the related laws serve as the sole resource, or the safest one, for a methodical explanation of dark and doubtful topics in the legal development of our own native system.

BRUNNER: *Deutsche Rechtsgeschichte*, i. 2.

"NO conception can be understood except through its history," says the Positivist philosopher; and of no legal conception in Anglo-American law is this more true than of the notion of Responsibility for Tortious Acts. By this phrase is indicated that circumstance or group of circumstances attending the initiation and eventuation of an acknowledged harmful result, which induces us to make one person rather than another (or than no one at all) civilly amenable to the law as the source of the harmful result (and independently of whether this person can show some recognized justification for the harm); and it is this notion whose history we find it possible to trace back in a continuous development in our Germanic law, without a break, for at least two thousand years.

To get a starting-point, let us look back from present principles. The law to-day, so far as we are entitled to take it as standing on a rational basis, distinguishes classes of cases which may be roughly generalized for present purposes as follows: (1) Cases where the source of harm is pure misadventure, as where a cus-

tomer is handling a supposed unloaded gun in a gun-store, and it goes off and injures the clerk; (2) Cases where no design to injure exists, but a culpable want of care is found; (3) Cases where no design to injure exists, and yet no inquiry into the actor's carefulness is allowed, — in other words, where he does the specific harm-initiating act "at his peril," as where he fires a gun in the street, or cuts grass or sells goods which prove to be those of another; (4) Cases where actual design to produce the harm exists.[1] Now, the thing to be noted is that the primitive Germanic law knew nothing of these refinements; it made no inquiry into negligence, and it raised no issue as to the presence or absence of a design or intent; it did not even distinguish, in its earlier phases, between accidental and intentional injuries. The distinctions of to-day stand for an attempt (as yet more or less incomplete) as a rationalized adjustment of legal rules to considerations of fairness and social policy. But the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance the visible source, whatever it be, — human or animal, witting or unwitting, — of the evil result. Both these extremes are fairly clear; it is the transition from one notion to the other which forms the interesting and complex process.

In endeavoring to realize the nature of the primitive canons of Responsibility, one must take into consideration the essentially superstitious and irrational spirit which pervaded the jural doings of primitive society; for the notion here dealt with was only one of the vehicles of its expression. One need not here call to mind in detail the characteristics of primitive culture; only certain of the more germane may be noted. The idea of transgression as associated with ceremonial observances;[2] the propitiation of deities by gifts and sacrifices;[3] the sense of pollution and contamination (as by the touching of blood or of a corpse);[4] the appeal to a decision of the Deity or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the

[1] Compare Holmes, Common Law, cc. iii., iv., esp. pp. 92 ff., 144 ff.; Pollock, Torts, p. 19. It is here assumed, for present purposes, that in the few classes of cases where actual malicious motive is material, no question of responsibility, properly considered, is involved.

[2] Spencer, Ceremonial Institutions, 10.

[3] Tylor, Primitive Culture (3d Amer. ed.), ii. 380.

[4] Tylor, Ib., ii. 429.

engaging in formal combat);[1] the arbitrary formalism of words and phrases in pleading and oaths,[2] — these give the tone to the times. In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by instincts of superstition, and that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

In this particular field, too, there are numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer;[3] the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief;[4] the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master;[5] the master was liable to his servant's relatives for the death, even accidental, of the servant, where his business had been the occasion of the evil;[6] the *rachimburgius*, or popular judge, was responsible for a wrong judgment, without regard to his knowledge or his good faith;[7] the oath-helper who swore in support of the party's oath was responsible, without regard to his belief or his good faith;[8] one who merely attempted an evil was not liable

---

[1] Lea, Superstition and Force, *passim*.

[2] Brunner, Deutsche Rechtsgeschichte, i. 181, ii. 349; Wort und Form in altfranzös. Prozess, 1868; and Revue Critique de Legisl. et de Jurisp., 1871–72.

[3] See *post*.

[4] See *post*.

[5] See *post*.

[6] Brunner, Deutsche Rechtsgeschichte (1892), ii. 549. "The master was liable for the *wergeld* of the workman if the latter lost his life in the service, and for the appropriate money-payment if he was injured, — so far as the injury could not be imputed to some third person for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a tree or of fire or of water, the accident was imputed to the master as *homicidium*. If one person sent another away or summoned him on the former's business, and the latter lost his life while executing the order, the former was taken as the *causa mortis*." See LL. Henry I. 90.

[7] Brunner, Ib., ii. 360. "That the intention to act wrongfully is presumed as of course against the defeated party [in a suit against the judges], and, especially as regards the judges, that the excuse of having judged according to their best knowledge and belief is not allowed, is merely an individual application of a fundamental principle pervading the Germanic penal law, which is to argue without question from the particular external circumstance to the presence of an unlawful intent, and (apart from typical exceptions, not here involved) to treat unintentional misdeeds the same as intentional ones, without allowing proof of the absence of intent."

[8] Brunner, Ib., ii. 389. "The earlier times paid no regard to the good faith of the individual oath-helper, in accordance with their general principle of penal law, which

because there was no evil result to attribute to him;[1] a mere counsellor or instigator of a wrong was not liable, because the evil was sufficiently avenged by taking the prime actor,[2] and where several co-operated equally, a lot (frequently) was cast to select which one should be held amenable;[3] while the one who harbored or assisted the wrongdoer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result.[4] Of these various forms of the primitive notion which determined responsibility, we are here concerned with only a few, — those that have a more or less intimate connection with later doctrines of the English law of torts, and are therefore for us more worth tracing from early times.

These may be, for convenience, grouped into four classes, each one of which will be to better advantage followed out separately, — to be distinguished according as the harmful results may be traced back to (*a*) a personal deed; (*b*) an animal; (*c*) an inanimate thing; (*d*) a servant or slave. It will be convenient also to take up first the general Germanic notion, and follow it down to, say, the Norman Conquest, and then to keep to English soil, and trace down the later forms. As it happens, this division falls in fairly with epochs of doctrinal change. In this article, then, the idea will be taken up in its earlier forms only, as one common to the Germanic peoples.

---

without discussion treated the unlawful intent as accompanying the external fact of an offence. . . . The later development shows the tendency, on the one hand, to increase the punishment for a false oath, but, on the other hand, to distinguish between false oaths sworn wittingly and unwittingly." It may be suggested that when the learned investigator in these passages speaks, *e. g.*, of "treating the unlawful intent as accompanying, etc.," he is attributing to a past age the sentiments peculiar to the present one. The primitive Germans did not "presume" or "impute" an unlawful intent: they simply did not think of the distinction at all. To feel the need of such an element, and to "impute" or "presume" it, would be a mark of a later stage of development.

[1] Brunner, Ib., ii. 558. "The penalty of unintentional misdeeds is paralleled by the general impunity accorded to attempts." Moreover, though certain acts which fell short of causing death, and yet put life in peril (as pushing into the water, etc.) were treated as lesser offences, somewhat as we treat attempts; yet "it was immaterial whether the result was caused with the intention of killing, or with some other design, or unintentionally" (560).

[2] Brunner, Ib., ii. 565.

[3] LL. H. I. 59, 25; Brunner, Ib., ii. 468.

[4] Brunner, Ib., ii. 575. "From the jural notion that the misdeed in itself puts a man beyond the law, follows fundamentally the penalty of the act of rendering assistance. . . . [This notion] has to do with the idea that the helping of the offender is a mutiny against the common weal, or it springs directly from the principle that he who stands out for the wrongdoer takes upon himself, as against the community, the wrongdoing and its consequences."

I.[1]

We have, then, to deal with the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. In Brunner's words, "The early law knows no such thing as accident, but seeks always for something to make answerable, and determines it, by a scarcely appreciable causation-nexus, from the conditions of the harmful result."[2] The notion, as applied to persons, is that of the *schädliche Mann*, a man from whom some evil result has proceeded.[3] It can best be illustrated in advance by two instances, one drawn from a well-known tale in the Northern mythology, the other from mediæval Frisian chronicles: —

"Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things — fire, water, stones, trees, and all — not to harm Baldur; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt; and going in disguise to Frigga, he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went up to Hodur, the blind god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoe twig and guided his hand, and the twig flew, and struck Baldur lifeless. Then the other gods were for laying strong hands on the murderer; but they were in a sacred place. And Hodur fled. And Odin said, 'Now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades?' The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his

---

[1] NOTE. — This seems the best place to say, once for all, that the ensuing first part of the article is founded almost entirely on Prof. Dr. HEINRICH BRUNNER'S article in the Proceedings of the Royal Prussian Academy of Sciences, vol. xxxv., July 10, 1890, "Ueber absichtslose Missethat im altdeutschen Strafrecht." As to the sources there quoted, this part is in effect merely a reproduction of the salient ones. As to the conclusions reached, they have here been presented in a somewhat different form and arrangement, with a view to tracing subsequent English development; but it would seem that Professor Brunner would prefer this, for in his 1892 volume of the Deutsche Rechtsgeschichte he has chosen an arrangement more nearly resembling the present one. His article will here be cited as "Br., Pr. Ak.;" his treatise, as "Br., D. Rg." A few gleanings from recent volumes of the Selden Society, from Bracton, etc., have been added by the writer, so as to bring the topics in this part of the article down to about the 1200s in England.

[2] Br., D. Rg. ii. 549.

[3] Br., D. Rg. ii. 537.

hair until he had fulfilled his vengeance and smitten to death the slayer of Baldur." [1]

A clearer case of innocence, one would think, in these days, could hardly be made out; but not so by the tests of our ancestors. — Next, an example showing an exceptionally late survival of these ideas, and at the same time the transition to different standards: —

"Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head-money for the dead child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such good purpose that they altered it to this effect, — that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight." [2]

With these preliminary illustrations of the attitude of mind we are dealing with, we may take up, in the order of topics already named, the primitive ideas for the exposition of which we are indebted to the great Brunner.

a. Harm connected with a Personal Deed.

It is not possible to draw hard-and-fast lines in tracing the stages of development; we can simply note that there were several stages, and point to particular rules or passages as illustrating approximately this or that successive form.

1. Of the primitive form of absolute liability, then, we find a few comparatively late traces; though, as Brunner points out, the fact of the necessity for an express mention of a prohibition or

---

[1] In Bugge, Norrven Fornkvaedi (Christiania, 1867), p. 212, is another instance, from the Song of Sigurd, the slayer of the dragon Fafnir. Loki, in company with Odin and Honir, had seen an otter and killed it with a stone; for it had been carrying off the pelts belonging to the gods. But they discovered that the supposed otter was none other than the son of Hreidmar, who had put on the form of an otter; and, for the compensation they were obliged to give, they filled the otter-skin within and covered it without with gold, and gave it to Hreidmar.

[2] A. D. 1439, Richthofen, Friesische Rechtsquellen, 570.

a penalty in a law is often an indication that the popular regard for the principle involved is on the wane.

Lex Bavariorum, 19, 6. — "Who injures the corpse of a man whom another has killed, either by cutting off the head or the ear or the foot, or by otherwise drawing the slightest blood, pays a fine of twelve shillings." The example then given is this: The corpse of a murdered man is discovered by birds of prey, who settle upon it to devour it; a man sights them and draws bow at them, but strikes the corpse so that it is wounded: he shall pay the fine.

Westgothic Law.[1] — The rule of Wamba: "Ut quicumque deinceps occiderit hominem, si volens aut nolens homicidium perpetravit, . . . in potestate parentum vel propinquorum defuncti tradatur."

Roger of Sicily's Law (1100–1150).[2] — "Qui . . . lapidem ad aliud jecit hominemque occidit, capitali sententia feriatur." The notable thing is that the first part of the law is a copy of the *Lex Cornelia de sicariis;* but liability is substituted for non-liability, and the above is added.

Anglo-Saxon Law. — (1) Beowulf (Chronicles) v. 2436 (ed. Heyne): the story of King Hredel, whose second son, Haedcyn, unfortunately killed his brother by an arrow which went wide of the mark. The death of the slayer was required in expiation; and the king so mourned at the untimely loss of his two sons that he took his own life. (2) LL. Henry I. (so called) 90, 11: "Legis enim est, qui inscienter peccat scienter emendet, et qui brecht ungewealdes [unintentionally] bete gewealdes, . . . [*e.g.*] si alicujus equus, ab aliquo stimulatus vel subcaudatus, quamlibet percuciat."[3]

---

[1] Walter, Corpus Jur. Germ., i. 668. The general dates of these Germanic codes vary from 400 to 900 A. D. *circa*. The large collections usually referred to are Mon. Germ. Leg., and Schmid's Gesetze d. Angels.; others are noted in Br., D. Rg., I. vii.

[2] Merkel, Commentatio, 1856, p. 31, fragm. 42.

[3] It must be remembered that we are here dealing with a sentiment characteristic of primitive justice everywhere. For the Greek and Roman evidences, see Hepp, "Die Zurechnung auf d. Gebiete d. Civilrechts," 1838. The following casual examples, as cited by Blackstone (iv. 187), may here be given: —

Ek: Patroclus tells Achilles, in the latter's dream, that when a child he was obliged to flee the country for casually killing a playfellow, *νήπιος οὐχ ἑθέλων* (Iliad, xxiii.). Voluntary banishment for a year was the penalty for homicide by misfortune (Plato, Laws, ix.).

Roman: Casual homicide was excused only by the indulgence of the emperor, certified by his own signature (Cod. 9, 16, 5).

Hebrew: "As when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die; he shall flee unto one of those cities [of refuge], and live." But the avenger might slay him on the way, or on his withdrawal from the city at any time before the death of the high priest (Numbers xxxv. 26; Deut. xix. 5).

It may be noted here that the proceeding of attaint was only a later form of the same early notion. In early times it was a general custom, where adultery or the like was discovered, to slay every living thing within the house, whether man or beast.[1] The legal visitation of the sins of the fathers upon the children was one of the latest survivals of this idea.[2]

2. As times change, and superstition begins to fade, the notion of "misadventure," "ungefähr," is hazily evolved, and facts of the sort are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring his punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family.

Holland. — In 1425 Aelwyn, a citizen of Delft, had "by ongevalle ende onwetende"[3] killed another. The case went to the lord, Philip of Burgundy, who granted a pardon: "We hold the said Aelwyn quit and forgiven by this letter of all wrong and misdoing which he has done against us and our lordship, and we give him again his life and goods, which he thereby should have forfeited to us."[4]

France. — (1) *Coutumes du Beauvoisis:*[5] "In case of accidents happening by mischance, in such cases *pitès et misèricorde* ought rather obtain instead of stern justice." When a man in turning his wagon injures another, "it is a case of mischance, and the wagoner should be shown mercy, if it does not appear that he managed it with a malicious purpose of injuring the other." If one is separating two quarrellers, and accidentally injures the one who is his friend, "let mercy be shown him." (2) *Somme Rurale:*[6] Under the head "d'occire autre par cas d'aventure," all such cases are said to fall under the penalty of death, and to need remission by the prince.

England. — (1) Anglo-Saxon laws, quoted *post.* (2) Bracton, De Legibus: "Crimen homicidii, sive sit casuale vel voluntarium, licet eandem

---

[1] J. Grimm, in Zeitsch. f. deutsches Recht, v. 17, 18.

[2] Bracton says (f. 105 *b*): "Crimen vel pœna paterna nullam maculam filio infligere potest;" but this is a borrowed humanity, and does not represent the actual law of his time. By the Golden Bull of Charles IV. in 1356, the lives of the sons of such as conspire to kill an elector of the Imperial Crown are spared by the Emperor's particular bounty; but they lose all rights of succession and of holding office, "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father, may languish in continual indigence, and may find their punishment in living and their relief in dying." In Blackstone's time this corruption of blood still existed, though he disparages it; but the forfeiture of estates he defends on grounds of policy.

[3] "By accident and unwittingly."

[4] Groot, Charterbuch, 4, 800.

[5] Beaumanoir, c. 69.

[6] Bouteiller, ii. 40.

pœnam non contineant, quia in uno casu rigor, in alio misericordia" (f. 104 *b*; also 141 *b*). (3) Stat. Gloucester (6 Ed. I., 1278) c. 9: If one kills another in defending himself or by misadventure, he shall be held liable, but the judge shall inform the king, "et le roy lui en fera sa grace, s'il lui plaist." (4) Fleta[1] repeats the rule of the statute. (5) Early cases in the King's Court: (1214) "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king, moved by pity, pardoned him the death. So let him be set free."[2] (1225) "Mabel, Derwin's daughter, was playing with a stone at Yeovil, and the stone fell on the head of Walter Critele, but he had no harm from the blow; and a month after this he died of an infirmity, and she fled to church for fear, but [the jurors] say positively that he did not die of the blow. Therefore let her be in custody until the king be consulted."[3,4]

It is to be noted that a killing done in self-defence was regarded as one of those which required to be pardoned in this way by the king; and this notion long left its impress on English criminal law.[5]

Early Cases. — (1221) "Howel, the Markman, a wandering robber, and his fellows assaulted a carter and would have robbed him; but the carter slew Howel, and defended himself against the others and escaped them. And whereas it is testified that Howel was a robber, let the carter be quit thereof. And note that he is in the parts of Jerusalem, but let him come back in security, quit as to that death."[6] Note that there is here no resort to the king's pardon, yet the carter had thought it wise to seek safety by absconding. — (1203) "Robert of Herthale, arrested for having in self-

---

[1] i. 23, 15.

[2] Selden Society, Pleas of the Crown, i. No. 114.

[3] Ib., No. 188. See also Bract. N. B. iii. 157, No. 1137 (A. D. 1235–36), where "nescitur adhuc utrum ipsum interfecit per infortunium vel alio modo," and so the defendant is allowed to abjure the kingdom.

[4] Bracton, in De Legibus, as above, shows the rule. But other passages there occur which are quite inconsistent with this, and would even do well enough as a rough statement of to-day's law. Of homicide by chance, he says, "as where a person has thrown a stone at a bird or an animal, and another person, passing unexpectedly by, is struck and dies, . . . here it is to be distinguished whether the person was engaged in a lawful or in an unlawful affair. . . . If he was engaged in a lawful affair, . . . if he used such care as he could, . . . it is not laid to his account" (120 *b*). Again, he uses the old Roman example of throwing a ball at play and hitting a razor in the hands of a barber while shaving (136 *b*). The explanation is simple: he is here copying and adapting from the Roman and civil law, — in the latter case from Dig. 48, 8, 14 (as Brunner points out); in the former from Gregory's Decretal (v. tit. xii.; 1234 A. D.) "de homicidio voluntario vel casuali" (as Twiss points out, Pref. II. lix.).

[5] Bl. Comm. iv. 182–188.

[6] Seld. Soc., Pl. Cr., i. No. 145.

defence slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter." [1]

3. But still, in the earlier days, the malfeasor by misadventure must at least pay a fine, though released from the penalty of death, and, later on, when the blood-feud had disappeared and a fixed payment was the regular form of civil liability, he must pay a portion of the ordinary amount.

Holland. — In 1438 Philip of Burgundy pardons by special grace the members of a guild in Leyden who have killed some one by misadventure, remitting the forfeiture of life and goods, but saving the expiation-money due the dead man's kindred.[2]

Franks. — Capitulary of Charlemagne, 819 A. D., with instructions to the *missi*, or itinerant officials: As for a person held to answer, "let this be the treatment, that if one has offended ignorantly, let him not be obliged to pay according to the full rule, but as near as seems possible." [3]

England. — LL. Henry I. (so-called), 90, 11: After the maxim above cited, "qui inscienter peccat scienter emendet," and the illustrations of misadventure, "In these and like cases, where a man intends one thing, and another eventuates, *i. e.*, when the result, not the intention, is charged as blamable, let the judge fix a small fine and fee, inasmuch as it really occurred by accident." [4]

4. Moreover, probably at a somewhat later stage, as the notion of complete exculpation (in a criminal process) grows, the malfeasor

---

[1] Seld. Soc., Pl. Cr., i. No. 70. So also Bract. De Legib. 1446, mentioning a case of a pardon to a man who defended himself against a burglar in his own house (1234); Bract., Note-Book, iii. 229, No. 1216 (A. D. 1236-37), where the jury found a killing in self-defence, and "dominus rex de gracia sua, non per judicium, perdonavit ei mortem illam" (1236); also Bract., N. B. iii. 107, No. 1084 (A. D. 1225). These were before the Statute of Gloucester (1278), cited above.

[2] Mieris, Handv. etc. d. Stad Leyden, 289.

[3] Boretius, Cap. i. 290, Cap. Missorum, ch. 15.

[4] In old Swedish law accidental killing is not to be punished unless both parties (*i. e.*, the deceased's relatives, practically) wish it (v. Amira, Altschwed. Oblig.-recht, 382). So in Japan a case is recorded (Simmons, Notes, etc., Trans. As. Soc. Jap., xix.), where the judge labors to induce the deceased's family to withdraw their charge against an insane murderer, and finally succeeds. This is probably the transition-form preceding the above stage; first, the family agree to compound for less money, and then the judge compels them to. A curious example of this phase is seen in the LL. Henry I.: where a man falls from a tree and kills another below, he shall be held innocent; yet the blood-feud will be allowed if insisted upon, but it may be carried out in one way only, — the avenger may himself mount the tree, and in turn fall upon the slayer. This is recorded also in Holland (Brieler Rechtsbuch, Matthijssen, 212), and in a Hindu popular tale (Kohler, Shakspeare in d. Forum d. Jurisprudenz, 93).

must, immediately after the occurrence, give notice of it, and swear an extra-processual exculpatory oath as to its occurring by accident or in self-defence; otherwise, he loses the benefit of the plea if suit is brought.

Franks. — Lex Ripuaria, 77: When a man slays a malefactor, *flagrante delicto*, who has resisted capture, he must make oath with eleven helpers that he slew the other as an outlaw; if he does not, "Homicidii culpabilis judicetur." Then afterwards he must come to his trial within forty nights, and make oath with thirty-six law-men.

Sweden. — The wrongdoer by misadventure, without waiting for suit, must offer an oath and render satisfaction for the deed.[1]

Holland. — The oath of exculpation for the death of a servant declared that it happened "by his self's fault and by misadventure, and without deed of his."[2]

In the thirteenth century, then, in England we find the primitive notion still living; in cases of homicide, at least, the slayer forfeited goods and paid some fine or fee to the king in a criminal process, and in probably all torts the harmdoer paid some compensation to the injured party.[3]

We leave this topic at this stage, and turn to —

b. Harm connected with Animals.

The successive phases of development are nearly akin to those already considered.

1. Of the primitive idea of full liability for harm caused by one's animals, there are a few traces.

Sachsenspiegel[4] speaks of complete liability being the ancient rule, "quantum si facinus in persona propria commisisset."

2. In the next phase, the injured party is found without the privilege of carrying out the blood-feud; this recognition of the unintentional nature of the deed seems to have come earlier here than in any other class of cases. But the owner is still answerable for the *wergeld* or the *compositio* appropriate to the harm done, —

---

[1] v. Amira, Altschw. Oblig.-r., 379.

[2] Brieler Rechtsbuch, Matthijssen, 210. So also, in maritime law, for a death on shipboard. Fruin, De oudste Rechten d. Stad Dordrecht (1882), ii. 52, No. 70; i. 235, No. 79; and R. Wagner, Handbuch d. Seerechts, i. 399.

[3] For some cases of "misadventure" not particularly significant, see Seld. Soc., Pl. Cr., i. Nos. 81, 132, 156, 203.

[4] Landr., ii. 62, Sunesen, 55.

by most laws for the full sum, by others for an aliquot part; and in many cases the value of the mischievous animal, if surrendered, can be used in reduction of this sum.

The full sums were required by the early Lombards,[1] the Anglo-Werini,[2] and the Saxons;[3] the Alamanni[4] required it for injuries by horses, oxen, swine, but one half only if by others; the Frisians[5] required one quarter only. The Salians (early period)[6] and the Ripuarians[7] required the whole, but allowed the animal to go for one half. The later Lombards required one half.[8] These rules may be traced in much later records of those regions.[9]

The next step is to absolve the owner entirely, if he divests himself of all relation with the accursed thing by putting it from him entirely; and this would take place, (1) in the beginning, by handing it over to the injured party for the infliction of vengeance (or, as above, in time, as in some sort a compensation or perquisite), and (2), later, by merely turning the animal loose.

(1) *Lex Visigoth.*[10] — The animal is delivered "ut eum occidat."

LL. Alfred.[11] — (871–901) "If a neat wound a man, let the neat be delivered up or compounded for."

Fitzherbert.[12] — (1333) "If my dog kills your sheep, and I, freshly after the fact, tender you the dog, you are without recovery against me."

(2) *Flanders.*[13] — (1241, 1264) The owner is not liable if he "expellet et abneget" the animal.

Poitou.[14] — The owner is freed if he "désavouer" the animal; and he is bound if he takes it back again.

Norway.[15] — The owner is free if he "von der hand sagen" the horse, swine, ox, or dog; otherwise he is liable as if the murderer.

The owner would thus not be liable if the animal had escaped; for he is no longer connected with it, he is absolved.

---

1 Rothar, 326–8, 330.
2 Lex Ang.-W., 52.
3 Lex Sax., 57.
4 Pactus Alam., iii. 17.
5 Lex Fris. Add., 3, 68.
6 Lex Salica, 36.
7 Lex Rip. 46.
8 See note 1.

9 Etablissemens de St. Louis, i. 125; Warnkönig, Flandrische Rechtsgesch., ii. 2, 226 (1265). In Pact. Alam., where a dog bit to death, the half *wergeld* was allowed; yet the avenger might demand the whole, on condition that he should suffer the dog's dead body to hang in his doorway till it rotted away (iii. 16).

10 Lex Visig., 8, 4, c. 20. *Accord.*, Schwabenspiegel, Lassberg, 204.

11 C. 24.

12 Abridgm. Barre, 290.

13 Warnkönig, Flandr. Rechtsg., ii. 2, No. 222; iii. No. 166.

14 Livre des droiz et des commandemens, c. 871.

15 Brandt, Vorlaesinger over d. Norske Retshistorie, ii. 46.

Twisden, J.:[1] "If one hath kept a tame fox, which gets loose and grows wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature:" this seems to be a trace of the early notion.[2]

Moreover, the notion that the owner is liable if he harbors or takes the animal back after repudiation,[3] became, when rationalized as time went on, one of the sources (apparently) of the *scienter* rule in English law.

It must be added that the idea of receipt by the opposite party for the purpose of wreaking private vengeance was largely supplanted by the idea of forfeiture to the authorities for public punishment: sometimes the animal was outlawed, and could be killed by any one;[4] later he was forfeited to the lord or to the church.[5]

4. Along with all this we find in various regions in later times the requirement of an exculpatory oath as a preliminary to allowing the owner to free himself by giving up the animal. The oath perhaps at first declares merely that the owner was not privy to the wrong; but later it is that the owner was not aware of the animal's vice.

Lex Salica.[6] — "Per lege [oath] se defendere potest, ut nihil pro ipso pecore solvat."

Livre des Droiz, etc.[7] — "Celui a qui le beste sera est tenu de amender le dommage au blécié; et si ne fera amende a justice, par quoy il ose

---

[1] Mitchel *v.* Alestree, 1 Vent. 295 (1676).

[2] For further traces in later times, see Holmes, Common Law, 22.

[3] Poitou, *supra*; Sachsenspiegel.

[4] Bouteiller, Somme Rurale, i. 38; Magk (Norway), in Paul's Grundriss d. germanisch. Philol., ii. 1, 120; Andrese, Stadregt v. Vollenhove, i. 316. There is running down till a fairly late period the idea of taking vengeance on the accursed thing, just as against human beings. The animal was "condamné en exil." There was a special procedure against animals (just as against slaves) in many parts. Joined with this idea of expiation was, as Mr. Justice Holmes aptly suggests, apparently a mere sense of anger: "the hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when it pinches his finger, is embodied in the *noxæ deditio* and other kindred doctrines of early Roman law" (Common Law, 11). For Roman and Greek illustrations, see that passage. But the sentiment which ultimately grew up may be early seen in scattered passages: "Car bestes mues n'ont nul entendement, qu'est biens ne quest maus" (Beaumanoir, 6, 16).

[5] Etablis. de St. Louis, i. 125; Coutumes de Touraine-Anjou, 114; Livre des droiz, etc., 119; Bouteiller, Somme Rurale, i. 37; and elsewhere.

[6] C. 36 (later texts).

[7] C. 114; Etabl. de St. Louis, i. 125; Bouteiller, Somme Rurale, i. 38 (where the owner had been warned by the local authorities).

jurer qu'il ne sceust la teiche de la beste [that he did not know the vice of the animal]."

Flanders (1241).[1] — The owner is not liable unless the animal has for at least two days shown "manifestae noxae."

From this basis (and perhaps that just mentioned) the later doctrines of *scienter* in cases of violent injuries, were easily worked out.

c. Harm connected with Inanimate Things.

Here we may trace, *mutatis mutandis*, stages of development substantially analogous to those found in the preceding class of cases.

1. Of the most primitive form, subjection to the blood-feud for injuries caused by things belonging to a person, and without the owner's personal use of them, there are only a few traces, for the change came early.

In early times,[2] when rape or adultery was committed in a house, its inmates were killed, and the house (of commission or of refuge) was destroyed.

2. This passes into a mere pecuniary liability, accompanied sometimes by the duty of handing over the injuring thing, sometimes by the privilege of using its surrender to reduce the amount of the payment.

LL. Henry I.[3] — A fine was imposed "si alicuius arma perimant aliquem ibidem posita ab eo cuius erant."

Schleswig.[4] If one is building a house, and a beam falls and kills a man, the beam is to be given over to the dead man's heirs (or, by later law, merely thrown away), and the owner also pays them 9 marks.

3. The notion of complete exculpation by a surrender or repudiation of the offending thing, or by an abstention from using it again, very early makes its appearance.

Lex Rip.[5] — "Si quis homo a ligno seu a quolibet manufactile interfectus, non solvatur,[6] ni forte quis[7] auctorem interfectionis in usus proprios adsumperit; tunc absque frido culpabilis judicetur."

Schleswig. — In the case above, if the beam is built in after all, the whole house is forfeited.

---

1 *Ubi supra.*

2 J. Grimm, in Zeitsch. f. deutsches Recht, v. 17–18.

3 C. 90, 11.

4 Thorsen, Juttish Town Laws, 19, 49, 75, 192.

5 C. 70, 1. This is found in almost the same words in LL. Henry I., 90, 6.

6 No payment need be made.

7 Observe that *any* one who uses them is liable.

Norway.[1] — A traveller speaks of seeing sickles, axes, and the like, with which men have been killed, lying about abandoned and unused.

LL. Henry I.[2] — The owner of weapons used by another to do harm must not take them into his hands again till they are "in omni calumpnia munda."

The notions with regard to the forfeiture of such noxal things passed through phases similar to those respecting animals; and the "deodand" is one of the traces in later law.[3]

4. In some cases the feature reappears (along with the principle of exculpation by surrender or repudiation) of a preliminary exculpatory oath.

LL. Henry I.[4] — Where a man puts down his arms somewhere, and another takes them and does harm with them, or where he has left them with a polisher or a repairer, and the like happens, the owner must free himself by oath.

5. Finally, but coming at different times with respect to different classes of things, we find something approaching a rationalization of the rules. In some clear cases there is an absolute exculpation, without more said; in others, there is a foreshadowing of a test of due care or the like.

Lex. Burg.[5] — It is found necessary to say that if a lance or other weapon is stuck in the earth, and a man or animal chances to trip on it, the owner need not pay.

Lex Sax.[6] — Payment must be made, where injuries occur from ditches or traps, "a quo parata sunt."

Lex Anglo-Wer.[7] — "Qui machinamentum fecit, dampnum emendet."

LL. Alfred.[8] — Where a man is injured by a spear in another's hand, he is liable "if the point be three fingers higher than the hindmost part of the shaft; if they be both on a level, . . . be that without danger."

Sweden.[9] — At first the owner, but afterwards the user, of the noxal instrument must respond.

---

1 Liebrecht, Zur Volkskunde (1879), 313.

2 C. 87, 2.

3 Holmes, Common Law, 25, citing, among other cases, "If my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited" (Plowden, 260).

4 C. 87, 2.

5 C. 18, 2, and see LL. Henry I., 90, *passim*.

6 C. 58. Cf. also Lex Rip. 70, 2: "Si quis autem fossam vel puteum fecerit, seu pedicam vel balistam incaute posuerit, . . . culpabilis judicetur."

7 C. 61.

8 C. 36.

9 v. Amira, Schwed. Obligationsr., i. 386.

France.[1] — When a man is killed during the erection of a house, neither the structure nor the master shall bear any liability, if a warning notice had been given.[2]

d. Harm connected with a Servant.

1. There was certainly a time when the master bore full responsibility for the harmful acts of his serf or his domestic. It is worth while to emphasize this by quoting passages from Professor Brunner's chapter on "territorial lordship,"[3] his name for "the sum of the rights exercised by the lord over the tenants." —

"As regards the origin of territorial lordship, we have to distinguish in the Frankish empire a lordship by Germanic law and one by Roman law. The starting-point of the former is the responsibility of the lord for his people. According to Germanic law, as above remarked, the house-master was responsible to third persons for those attached to his house. This responsibility extended not merely to bondsmen, but also to half-free and free persons. If a free but landless man remained for some time in the house of another, he acquired a relation of dependency which established the responsibility of the house-master. . . . The liability of the master extended not merely over bondsmen living in the house, but over those settled on the land, and even over those elsewhere, so long as the master kept his ownership and no third person became responsible by receiving the man. . . . The responsibility of the master for free persons extended at least to those living in his house, followers and vassals not excepted. How far it extended without the circle of actual members of the household is doubtful. . . . For misdeeds of the bondsman the master originally bore full responsibility towards third persons. He had, as the party to the suit, to represent him and to render satisfaction for him. . . . The responsibility for free persons shows itself in the form of a duty upon the master to answer for the freeman's misdeeds."[4]

2. This responsibility disappeared in the case of freemen, as time went on, so that the master could relieve himself by handing them over to the regular courts; and this apparently worked a

---

[1] Bouteiller, Somme Rurale, i. 39.

[2] But as late as 1466 a counsel thus argued in England: "If I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, etc.; and yet the raising of the house was lawful, and the timber fell, *me invito*, etc." (Fairfax, in the Thorn-cutting case, Y. B. 6 Edw. IV. 7, pl. 18).

[3] Deutsche Rechtsgeschichte (1892), ii. § 93; see also i. 71, 98.

[4] Further references are: Meyer, Zeitsch. f. Rechtsges. german., Abth. ii. 94; Leseur, Rev. hist. du droit franc. et étrang., 1888, p. 576; Jastrow, Strafrechtl. Stellung d. Sklaven in Deutschl. u. Anglo-Sax., 1878.

complete discharge. But in the case of serfs and domestics, the effect of a surrender was at first merely to relieve from the blood-feud and from the payment of peace money; it put the situation on the footing of a "misadventure," as then conceived, *i. e.*, it left the master liable to pay compensation-money.

Kent Laws.[1] — "If any one's slave slay a freeman, whoever it be, let the owner pay with a hundred shillings, give up the slayer, etc."

Lex Anglo-Wer.[2] — "Omne damnum quod servus fecit dominus emendet."

3. Then comes the usual step of allowing the value of the surrendered slave to be set off, and finally of complete exoneration by surrender of the slave; at first to the injured family, then generally to the courts for justice to be done.

Lex Salica.[3] — The master pays one half the *wergeld* and, for the other, surrenders the slave.

Laws of Ine.[4] — "If a Wessex slave slay an Englishman, then shall he who owns him deliver him up to the lord and his kindred, or give 60 shillings for his life."[5]

LL. William I., c. 52. — "All who have servants are to be their pledges; if any such [servant] is accused, they [the masters] are to have him before the hundred for trial. If in the mean time he flees, the master shall pay the money due."[6]

4. And, accompanying the later form (complete exoneration), the master must usually swear an exculpatory oath denying any connivance with the deed; for the exoneration presupposes that the master had no part in the deed.

Chilperic.[7] — "Tunc dominus servi, cum VI [hominibus], juramento [affirmet] quod pura sit conscientia sua, nec suum consilium factum sit nec voluntatem eius, et servum ipsum det ad vindictam."

---

[1] Thorpe, i. 27, 29.

[2] C. 59.

[3] 35, 1; 35, 5. *Accord.* Pactus Alam. iii. 17; Lex Fris., 1, 13 (slave for one third); Lex Bavar., 8, 2, 89 (for 20 s.).

[4] Laws of Ine, 74.

[5] The slave might, in a few communities, merely be set free (as with animals) and the responsibility thus disclaimed; but this was forbidden by a Carolingian capitulary as against peace and order, and persisted only in South France (Br., Pr. Ak., 832). As in the case of animals, the giving of nourishment after the deed was equivalent to a sanctioning by harboring (Br., Pr. Ak. 833).

[6] Bract. De Legibus, f. 124 *b*, *accord.*

[7] Edict. Chilp. c. 5.

Lex Sax.[1] — He gives up or sets free the slave, and swears "se in hoc non conscium esse."

In Norman England we find this notion, "se hoc non conscium esse," "pura conscientia," "nec suum consilium . . . nec voluntatem eius," distinctly reappearing in the idea that it made a difference whether the master consented to or commanded the harm done by the servant or other member of his household. But it is necessary, before risking a generalization, to set forth the available evidence.

Seld. Soc., Manorial Courts, i. 8 (1246). — "Isabella Peter's widow is in mercy for a trespass which her son John had committed in the lord's wood."

P. 9 (1247): "Roger the Pleader is at his law against Nicholas Croke, [on the issue] that neither he [Roger] nor his killed Nicholas' peacock."

P. 17 (1248): "Hugh of Stanbridge complains of Gilbert Vicar's son and William of Stanbridge that the wife of the said Gilbert, who is of his [Gilbert's] mainpast,[2] and the said William unjustly, etc., beat . . . And Gilbert and William come and defend all of it fully."

P. 96 (1279): "They say that the ploughman of Sir Ralph Rastel beat and ill-treated John Scot. . . . And one Thomas, the servant of the said Sir Ralph Rastel, by way of objection said that . . . the said John Scot beat and ill-treated the said ploughman. . . . The jurors say that J. Scot did not beat [the ploughman]. . . . Therefore the said Thomas is in mercy, 12 d."

Seld. Soc., Manorial Courts, i. 149, 153, 154. — Court of the Fair of St. Ives (1275), Saturday, May 11: "Hugh of Swinford comes and complains of Thomas of Toraux, the Canvasser. . . . And the said Thomas comes and is charged and convicted of having by [his servant] Simon the Blake of Bury sold canvas by a false ell in his booth. And R. B., R. P., and J. G.[3] are associated with him in that booth." . . . Wednesday, May 15: "Let all the merchants . . . be summoned to come to-morrow before the steward to adjudge and provide that Thomas of Toraux, R. B., R. P., and J. G., merchants selling canvas, have justice and equity in the matter of Simon the Blake of Bury, servant of said Thomas and his fellows, who was found in their booth measuring canvas with a false ell and selling it. Pledge for Thomas' appearance, all his goods." . . . Thursday, May 16: "For that Simon the Blake of Bury was found, etc., . . . the said merchants as well as the said Simon were accused as consenting to the said

---

[1] C. 18. *Accord.* Lex Fris., 1, 73; Knut, p. 75; Lex Alam. 78, 6; Roth. (Lombards) 264, 342; Lex Salica, 35, 5 (later texts).

[2] Household.

[3] Abbreviations are here made where feasible.

iniquity, and the said Thomas and his fellows named above have offered to prove . . . that they are not guilty thereof . . . and for that the said Simon confessed . . . it was ordered that his body be arrested. . . . And the said merchants give 40*s.* to the lord for his grace and favor."[1] In a later suit (p. 155) by Simon's lawyer, it appears that Simon "confessed in full court that he received the said rod by the hand and bailment of one Thomas of Toraux, merchant of Rouen, whom he thereof vouched to warranty," and that he was "not to withdraw himself from his plaint, but was to press his suit against the said Thomas;" yet he did withdraw his voucher.

Seld. Soc., Court Baron, 36 (1250–1300 A. D.). — William of Street's Case: Charge against one who sent his son in to take fruit from the lord's tree; denial that the son ever did so at his bidding: "William (saith the steward) at least thou canst not deny that he is thy mainpast,[2] nor that he was seized in the lord's garden . . .; how wilt thou acquit thyself that thou didst not make or bid him do this?" "Sir, for the deed of my son and the trespass I am ready to do thy will, and I ask thy favor. My pledges are etc." "But how wilt thou acquit thyself of the sending and bidding?" "In such wise, sir, as this court shall award that acquit myself I ought."

P. 38: William Lorimer's Case; charge of sending two men to cut stubble in E's field; denial, "never did such persons by his sending or bidding cut the stubble of that place nor carry it thence." So also Walter Coket's Case, p. 39. In another case of William Lorimer's, p. 55, he answers, "to prove that never did my folk, J. and T. by name, cut the stubble of that place by my commandment, nor carry it off, I am ready, etc." But in an alternative version, he denies that J. and T. were his mainpast, alleging that they were only laborers hired from day to day. Apparently either defence was good.

P. 53: "William of E., thou art attached to answer in this court wherefore thy son who is thy mainpast entered the lord's garden over the walls, etc. . . . Sir, [to prove] that never was any manner of fruit carried off by me, I will do whatever this court shall award that do I ought. — William, at least thou canst not deny that he was found inside and carried off divers kind of fruit at his will. — Sir, 't is true; wherefore I put myself in mercy."

Bracton, Note-Book. — II. 596, *No.* 779 (A. D. 1233): An assize of novel disseisin by Simon against John. J. did not come, but "William of L., his bailiff, came and said, for J., that if any disseisin was done it was not done by him, because he does not avow [*i. e.* sanction] the deed, nor, if it was done by his men, did any one come to him to lay it before him

[1] It does not appear whether the merchants were found by the jury to have consented; but if the confession of Simon, as set forth in the next paragraph, was taken as true, then they must have so found. The accusation implies that consent was necessary.

[2] Household.

[*ostendere*] so that he might make amends [*corigeret*]." And Simon replies, and ends by saying that "he sent to John asking that he should make amends [*emendaret*] and he refused to make amends." Ultimately John wins, "because he did no disseisin."

Ib., II. 600, *No.* 781 (A. D. 1233): An assize of novel disseisin by Ralph Basset against the Abbot of Kirkstede, for ploughing over the line of their fields, which adjoined. The Abbot denies any disseisin, and says, "that if his lay-members did anything there, this is not by him, and if it were so [*i. e.* that they had done harm] and it had been laid before him, he would have caused amends to be made [*emendari*], but if anything was done it was not laid before him, and therefore he says that *he* (*ipse*) did no disseisin if any was done." Then Ralph answers "that the Abbot well knew of it and it was laid before him, and the grain was carried off to the Abbot's own grange." The jury find that the ploughs of the Abbot did plough two or three feet over the line; and "on being asked whether the Abbot knew of this, they say that they cannot tell, but they do know well that the monks and the lay-brethren of the Abbot were there to see that it was done [? *ad visum faciendum*]; and since they did not lay it before the Abbot, the Abbot should fall back upon them [*capiat se ad eos*], for they ought to inform him of the affair. And because the jury say that the field was so ploughed and that there are no boundaries and that the Abbot last year had the grain carried off, it is adjudged that . . . the Abbot be in mercy; damage, 5*s.*" The jury here were asked if the Abbot knew of the deed; yet he lost the case, though the jury could not tell; and the annotator (an early hand) writes on the margin: "Note that if one's bailiffs and servants do not lay it before their master that a disseisin has been done, the master is not excused though he says that he knew nothing of it, inasmuch as his men knew of it. So also of monks rendering obedience."

Ib., II. 471, *No.* 616 (A. D. 1231): In an action for taking the plaintiffs' nets and preventing them from fishing, the defendants are asked "whether they themselves avow [*i. e.* are ready to answer for] the taking, or whether they did the taking by authority of the Abbot of St. Edmund's, whose men they are, and they say that they took the nets of their own authority and avow the taking." [1]

Bract., De Legibus. —*f.* 204 *b*: After dealing generally with the topic of disseisin, and passing to actions for disseisin by servants, he says: "But if they [the masters] have disavowed the deed of their men, and, when they shall have been sued in any respect by any man or in any mode, they shall not have made amends [*emendaverint*], they are still liable, so long

---

[1] Cf. also Br. N. B. III. 131, No. 1114 (A. D. 1234–1235), where the Prior of St. Swithin was summoned for having a gallows, etc., and violating royal privileges, and answered as to one charge, describing how the men of the place caught a notorious robber and murderer "et illum suspenderunt," but says "quod factum illum non advocat;" yet the defence was here insufficient, "et Prior in misericordia."

as they are present[1] and have freely placed themselves on the assize, although they are not named in the writ. But, if they shall have made amends for the deed of their men, whether before demand or after, as long as it was before the taking of the assize, they shall free themselves and their men from the penalty of the disseisin. But if the masters are occupied in parts remote, so that they cannot be made parties, and if they have not known anything about the disseisin, for this reason the assize[2] shall not be stayed." Here it seems that the avowal or disavowal affects merely the liability to a fine, and the duty to make compensation is assumed as invariable. Almost the same principles are further expounded at f. 171 *a* and f. 172 *b*. So also 158 *b*, as to distraints by the servant of a lord: "It must be inquired of the master whether he has avowed the deed of his servants or not; and if not, then the master will have an opportunity to make amends; but if he has avowed it or has not made amends, he makes the wrong his own, if there was a wrong."

We see here going on the process of a general leavening by the principle of "se hoc non conscium esse;" and apparently we are safe in concluding that by the end of the 1200s the general civil rule was as indicated by Bracton's statement on the particular topic of disseisin. In other words, so far as any penal results were concerned, the master could pretty generally[3] exonerate himself by pleading that he had not commanded or consented to the act;[4] while nevertheless this was only a growing exception to a responsibility which the moral sense of the community was still inclined to predicate generally, and accordingly the liability to make good any harm done — *i. e.* the civil liability — still continued without regard to command or consent. As we shall see later, the test of command or consent was soon after extended generally to civil liability also; and even in the 1200s we seem to see it coming. Yet as that century was not thoroughly conscious of the distinctions "civil" and "criminal,"[5] it can only be said that, at the point to which we have now traced the topic, we find that the test of command or consent was applied in some cases and not applied in others, the general notion being that absence

---

[1] In court.

[2] Against the servants.

[3] But for some time exceptions remained: Fitzh., Abridgm., "Corone," 148 (1315).

[4] This seems indicated by the questions of the steward in the Court Baron cases (with one exception) and the inquiry at the Fair of St. Ives; for in those cases the penal idea would apparently predominate.

[5] Notwithstanding Glanvil's and Bracton's use of the terms "placita criminalia" and "placita civilia."

of command or consent excused from correctional or penal consequences.[1]

In leaving these topics at this point, two things must be noted with reference to the sources from which we thus arrive at a knowledge of the root Germanic idea: (1) It is not an absolute and unvarying idea. It was not uniformly and invariably dominant, and there were of course exceptions more or less notable. Possibly one of these obtained in the case of fire kept in one's house and accidentally resulting in a conflagration;[2] this we shall consider later. But on the whole the popular ethico-legal sentiment was of the content above set forth. (2) The various stages of the idea's development, as already remarked, cannot be plainly

---

[1] The situation in the twelfth and thirteenth centuries is somewhat complicated by the responsibilities involved in the frank-pledge police regulations. But there can be no doubt on the evidence that there was a general Germanic notion of responsibility for servants, preceding and independent of the system of communal responsibility known as frank-pledge (whether it was or was not a direct successor of frithborg). This being understood, the authorities of the thirteenth century, rightly read, do not give us any reason to doubt that the responsibility for one's household was (though in actual content not dissimilar) in history and in popular feeling a distinctly different thing from the responsibility for one's neighbors in the tithing (frank-pledge). Thus Bracton (f. 124 *b*), after declaring that the tithing is not responsible for persons not required by law to be in frank-pledge, says that in such case that one shall be responsible in whose household he is, "nisi consuetudo patriæ aliud inducat," as in Hertford, where one is not responsible "pro manupastu [household] suo," unless by harboring an offender. Then, after describing the application of the rule to bishops, etc., and their duty to produce their servants to the court or pay a forfeit, he continues, "and so it shall be done for all others who are in anybody's household, because every man, whether free or serf, either is or ought to be in frank-pledge *or* in some one's household" (the italics are the writer's). He then reproduces the old Germanic ideas (LL. Hlothar and Eadric, c. 15) as to "household," — "receiving food or clothing from him, or only food with wages, . . . and according to ancient custom he may be said to be of one's family who has been given hospitality for three nights." (Cf. also Selden Soc., Pl. Cr., i. No. 55 (A. D. 1202): "William of Morton and Simon Carpenter are outlawed. . . . They were nowhere in frank-pledge, but servants of the Abbot of Woburn;" Bract., N. B. iii. 563, No. 1724 (A. D. 1226): "Henricus le Ireys captus . . . non est in decenna [tithing], nec habet dominum qui eum advocet, . . . suspendatur;" also Ib. ii. 116, annotator, and foot-note 1; Gneist, Const. Hist. Eng., i. 185; Bract., De Legibus, 153 *b*.) It seems clear, then, that there is nothing which should induce us to believe that the responsibility for servants was not a perfectly clear and natural one apart from frank-pledge. When we meet such expressions as "omnes qui servientes habent, eorum sint franc-plegii" (LL. Wm. I. c. 52; Thorpe, i. 487), and "if the servant of any lord . . . commits a felony, . . . [the lord] is to be amerced, and the reason is because he received him in bourgh [pledge]" (Fitzherbert, "Corone," 148), we see that we are dealing with expressions used either by way of analogy (the responsibility being in both cases practically the same) or at a later date in ignorance or in disregard of the former distinctions.

[2] Brunner, D. Rg., ii. 657–658.

pieced out for each of the Germanic communities; nor can it be asserted that for the whole race the development went on with any homogeneity of time and incident. What can be affirmed is merely that the idea, in the various communities and at various epochs, passed through stages such as those indicated.

John H. Wigmore.

NORTHWESTERN UNIVERSITY LAW SCHOOL, CHICAGO.